upon the constitutional phrase "taking of property." Property, in the constitutional sense, say many respectable authorities, consists not in the plot of land, but in the right to use it undisturbed.[4] Hence several decisions have called that a taking which without an entry by the trespasser virtually made the enjoyment by the ostensible owner impossible, as by a flood of water or of sand.[5] Others more broadly hold that an easement is property, the taking of which must be paid for.[6] The idea of property on which these cases proceed would lead to the conclusion that any material abridgment of rightful user is the taking of property.[7] On this theory, therefore, recovery might be had for all nuisances, however the legislature had attempted to sanction them, so far as they interfered with the comfortable enjoyment of an individual's land or chattel. This would make possible the collection of damages from a railroad company by very many whose land is situated near its line. Such incidental injuries, however, are said by the courts to be of that class which must be suffered for the common welfare, and which are too slight substantially to impair the rights of property recognized and protected by the state. That this position is logically inconsistent with any but a strict interpretation of constitutional phraseology has already been indicated, and that it is not even unequivocally desirable on grounds of public welfare is shown by the more modern constitutions and statutes, which provide for compensation when property is taken *or damaged.* Even these, however, under the narrow definition of property, leave many injured parties without a remedy.[8]

But whether or not the constitution is construed to assure compensation for an authorized nuisance the extent of the authorization is closely scrutinized. It may be because of such want of authorization that in a recent Texas case a householder was allowed to recover for mere personal inconvenience and annoyance arising from the operation of a freight depot near her premises. *St. Louis, etc., Ry. Co.* v. *Shaw*, 88 S. W. Rep. 817 (Tex., Civ. App.). A line of track authorized by legislative enactment necessarily entails certain inconveniences to a large share of the public, but freight yards, water-tanks, and round-houses are structures which may and therefore are intended to be located where they will be of the least possible harm to the community. For any nuisance due to their improper location the railroad is unquestionably liable.[9]

CONSTRUCTIVE TRUSTS ARISING ON BEQUESTS ON SECRET UNDERSTANDINGS. — It has recently been held in New York, that where a will recited that a bequest was to be used as the testator had ordered in his lifetime,

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[4] Lewis, Eminent Domain, §§ 54, 55. See Eaton *v.* Boston, etc., R. R., 51 N. H. 504, 511; Shaw, C. J. in Old Colony, etc., Ry. Co. *v.* County of Plymouth, 14 Gray (Mass.) 155, 161.

[5] Pumpelly *v.* Green Bay Co., 13 Wall. (U. S.) 166; Eaton *v.* Boston, etc., R. R., *supra.*

[6] See Lamm *v.* Chicago, etc., Rd. Co., 45 Minn. 71.

[7] Lewis, Eminent Domain, § 56; Cooley, Const. Lim., 7th ed., 787, 788; City of St. Louis *v.* Hill, 116 Mo. 527; Forster *v.* Scott, 136 N. Y. 577; City of Janesville *v.* Carpenter, 77 Wis. 288, 301; Pennsylvania R. R. Co. *v.* Angel, 41 N. J. Eq. 316, 329.

[8] See Aldrich *v.* Metropolitan, etc., El. Ry. Co., 195 Ill. 456.

[9] Baltimore, etc., R. R. Co. *v.* Fifth Baptist Church, 108 U. S. 317; Pennsylvania R. R. Co. *v.* Angel, *supra;* Missouri, etc., Ry. Co. of Texas *v.* Anderson, 81 S. W. 731 (Tex., Civ. App.).

and the context made it clear that the legatee was not to take beneficially, the bequest failed. *In re Keenan*, 94 N. Y. Supp. 1099.

In withholding the beneficial interest in the legacy from the legatee the decision is undeniably correct.[1] Common justice, at least, would forbid that he should hold beneficially, in the face of the express provision to the contrary in the will, and his own acquiescence in the oral instructions which lay back of the legacy. A trust, then, will be impressed upon the property in his hands, and the only open question is who should be the *cestui*. As to this question there are two well-known theories. One is, that the testator, having in himself the legal and equitable interests in the property, has given only the legal interest to the trustee; that the oral instructions are inoperative, because, without being duly executed in the testamentary form, they purport to dispose of the testator's beneficial interest upon his death; wherefore there is intestacy as to the beneficial interest, which accordingly passes to the next of kin.[2]

The unsoundness of this doctrine arises from the fact that the testator could not have had, in himself, both the legal and equitable interests as distinct things. For, as an equitable interest is merely a right *in personam* against a trustee, and the deceased could not have had a right of action against himself, he therefore could not have been intestate as to any such right. The full and absolute ownership of the property has, therefore, passed to the legatee. The legatee, however, by his express or tacit assent to the oral instructions of the testator has made a contract which the courts of equity specifically perform by enforcing the trust relation when the legacy vests. The oral instructions cannot be objected to under the Statute of Frauds, as the trust which they declare is one of personalty; nor under the Statute of Wills, since they effect the passage of no property from the testator. They tend simply to prove a personal obligation from a legatee to the orally designated *cestuis que trust*.[3] This theory of a contract on the part of the legatee is applicable to any case where the wishes of the testator are communicated to the legatee before he takes, not only when the bequest is on its face qualified but when it is absolute in form.[4] Even on this point, however, there is some dissent.[5]

RECENT CASES.

ADMIRALTY — TORTS — DIVISION OF DAMAGES BETWEEN TWO TORTFEASORS. — The plaintiff's ship collided with the ship "Caravellas," and the next day with the ship "Haversham Grange." Each inflicted damage upon the plaintiff's ship which made docking necessary, and in the dock both injuries were repaired simultaneously, those caused by the "Haversham Grange" being finished in six, those inflicted by the "Caravellas" in twenty-two days. The plaintiff sued the "Haversham Grange" for three days' dock dues and three days' demurrage. *Held*, that the plaintiff may recover the dock dues, but not

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[1] Taylor *v.* Plaine, 31 Md. 158.

[2] See Lewin, Trusts, 11th ed., p. 58; Olliffe *v.* Wells, 130 Mass. 221; Heidenheimer *v.* Bauman, 84 Tex. 174.

[3] See 5 HARV. L. REV. 389; Curdy *v.* Berton, 79 Cal. 420; Cagney *v.* O'Brian, 83 Ill. 72.

[4] Reech *v.* Kennegal, 1 Ves. 123.

[5] See Campbell *v.* Brown, 129 Mass. 23.